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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1964
No. 201

WILLIAM W. SCRANTON, Governor et al.,
Appellants

v.

IRA WALTON DREW et al.,
Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ARGUMENT

I. THE APPORTIONMENT OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES COMPORTS FULLY WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT AS EXPOUNDED IN THE RECENT DECISIONS OF THIS COURT

Appellees have here focused their attack upon the Pennsylvania Constitutional requirement that each county be represented by at least one member in the House of Representatives and the restriction that counties entitled to at least five representatives may be allotted additional members only for additional full "ratios of population". From these provisions the Appellees have calculated a list of mathematical monstrosities showing that one legislator represents 18 times as many constituents as another and that 43.2 percent of the State's population (unrefined for voting qualifications), could elect a majority of the House. Moreover, the Appellees see in these alleged inequalities a pattern of under-representation of the densely populated, urban and suburban counties and over-representation of the sparsely populated, rural counties.

The image conjured by Appellees is just that—a phantom without the substance of reality.

Argument

Quotation of selected population representative ratios gives little indication as to whether the electoral process has been distorted in any substantial manner. The constitutionally crucial issue is whether groups of voters are significantly over or under-represented in the General Assembly.

The House of Representatives of the General Assembly of the Commonwealth of Pennsylvania is structured in accordance with the population principle, subject to permissible minor deviations, and fairly meets the constitutional requirements established by this Court.

54 of Pennsylvania's 67 counties, with a combined population of 11,109,002 of the State's total population of 11,319,366, and with a combined membership of 196 of the House's total membership of 209, have been so fairly apportioned that, with but one exception, the average population per representative is within 2,000 of the mathematically exact "representative ratio" of 56,597 obtained by dividing the Commonwealth's population by 200. The sole exception is Delaware County, where the average population for its nine representatives is 4,864 above the representative ratio (Jurisdictional Statement A31).

The remarkable equality of the distribution of representatives among the counties is highlighted by the fact that the District Court, in constructing its own representative districts, sanctioned population deviations of as much as 13,622 from the representative ratio (Jurisdictional Statement A33).

Appellees' real quarrel is with the allotting of one representative to each of the 13 remaining counties whose combined population would, in the absence of the constitutional guarantee, entitle them to less than half as many

members. But these counties account for only six percent of the membership of the House of Representatives, and the approximately three percent over-representation which their inhabitants enjoy is too negligible to constitute a constitutionally impermissible dilution of the representation rights of the rest of the State.

Considering that the two largest and most urban counties, Philadelphia and Allegheny, alone have a total of 63 representatives—almost five times as many as the 13 smallest, rural counties put together—it can readily be seen that the Pennsylvania constitutional allowance of one representative per county has not in any meaningful sense interfered with the integrity of the electoral process and the principle of representation based upon population.

Neither has the Pennsylvania constitutional limitation that counties having five or more ratios of population are entitled to an additional representative only for each additional full ratio worked any mischief.

Two counties are said to be affected thereby. Allegheny County, with a population equal to 28.78 representative ratios, is allegedly discriminated against by being assigned only 28 representatives. Delaware County, with a population equal to 9.77 representative ratios, is declared to be similarly injured by being allotted only 9 representatives. This situation is contrasted with that obtaining in six other counties, four urban and two predominantly rural, each of which receives additional representation for a major fraction of a representative ratio.

From the standpoint of a 209 member House, the failure to accord these two counties one additional representative each, so that Allegheny might have 29 and Delaware 10, is too insubstantial to warrant the overthrow of the

House of Representatives as presently apportioned and constituted.

We need not dwell here upon the fiction that the apportionment of the House is a disguised attempt to perpetrate rural, minority control over an urban majority. Each urban county receives representation in each branch of the General Assembly substantially equal to its proportion of the State's total population. (See Jurisdictional Statement, C1-C3.) But a word must be said about what inference is to be drawn from the fact that it is mathematically conceivable that less than a majority of the population (if not of the electorate), of Pennsylvania could choose a majority of the members of the House. The arithmetic is meaningless except as a theoretical exercise because there is no such cohesive minority tied together by any shared characteristic. And, in point of fact, the nine largest and most heavily urban counties which contain 55.2 percent of the Commonwealth's population elect a majority of the members of the House (Jurisdictional Statement, A27-A28).

II. THE COMPOSITION OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES BASED UPON BOTH SINGLE AND MULTI-MEMBER DISTRICTS FULLY COMPORTS WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT AS EXPOUNDED IN THE RECENT DECISIONS OF THIS COURT

The conclusion of the court below, now supported by the Appellees, was that the "mix" of multi-member[1] and single-member districts in the House was not "justified" by appropriate explanation from Appellants and therefore constituted arbitrary and irrational classification violative of the Equal Protection Clause (Motion To Affirm, p. 21).

This contention is founded upon the assumption that single-member and multi-member districts are not interchangeable, one for the other, and that voters in the one type of district either have an advantage over or suffer detriment in comparison with voters in the other type of district. Aside from the arm-chair philosophizing of a professor of political science, there is no evidence whatsoever to support this view. Appellants maintain that the right of franchise is entirely unaffected by the circumstance of

[1] Under Article II, Section 17, of the Pennsylvania Constitution, no more than four representatives can be elected from any multi-member district. Under the Representative Apportionment Act there are 29 two-member districts, five three-member districts and five four-member districts (Jurisdictional Statement, A61).

whether it is to be exercised in the context of a multi-member or a single-member district.

As this Court said in *Reynolds:*

> "One body could be composed of single-member districts while the other could have at least some multi-member districts." 84 S. Ct. at 1389.

Even assuming that there is something of significance to be gained or lost by the voter from the choice of district, the District Court's conclusion that the classification scheme devised by the Legislature was arbitrary cannot be sustained.

Not only is there no evidence in the record that areas similar with respect to all significant factors were classified dissimilarly, but, on the contrary, Appellees' own academician pointed to at least one factor which could "justify" the difference in treatment—relative ease of communication and transportation (N.T. Hearing, January 17, 1964, pp. 132-141).

The intangible factors underlying the legislative choice between single-member and multi-member districts are often subtle and based more upon a representative's "feel" of the situation gained from years of political experience and insight into the operations of his district than upon objective criteria. Such exercise of discretion, however, based upon "expertise" in the political arts, ought not to be disturbed. See David, and Eisenberg, *State Legislative Redistricting*, 19, 22 (September 10, 1962).

In substituting its judgment for that of the Legislature, the District Court ignored the principles enunciated

by this Court that a statutory classification "will not be set aside if any set of facts reasonably may be conceived to justify it", *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), and that "the burden of establishing the unconstitutionality of a statute rests on him who assails it". *Metropolitan Casualty Ins. Co. v. Brownwell*, 294 U.S. 580, 584 (1935).

III. THE APPORTIONMENT OF THE PENNSYLVANIA SENATE COMPORTS FULLY WITH THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT AS EXPOUNDED IN THE RECENT DECISIONS OF THIS COURT

Appellees mount the same mathematical attack upon the composition of the Senate as they did upon the composition of the House, relying upon mechanical application of population senator ratio data. The assault comes with diminished force, however, since the alleged disparities do not loom as large. Thus, the most glaring disparity that Appellees can offer is that a senator from one district may represent two and a half times the number of persons represented by a senator from another. And, with respect to the issue of rural, minority control, it is said to take 44.6 percent of the total population of Pennsylvania to elect a majority of this branch of the General Assembly.

These alleged inequities are laid at the door of the Pennsylvania constitutional prohibition upon any county being allocated more than eight senators and the limitation that a county entitled to more than one senator may obtain an additional senator only if its surplus of population over its full ratios exceeds three-fifths of a ratio.

The compass of the asserted malapportionment is very narrow indeed. It amounts to no more than this: the 48 smallest counties of the State are over-represented by three senators at the expense of the counties of Philadelphia, Westmoreland and Luzerne, each of which should receive an additional senator (Jurisdictional Statement A21).

Philadelphia County, containing 17.6 percent of the State's population, elects 16 percent of the Senate. Luzerne County, in which 3.065 percent of the Commonwealth's population resides, is represented by two percent of the membership of the Senate. Westmoreland County, which contains 3.105 percent of Pennsylvania's inhabitants has been allocated two percent of the seats in the Senate (Jurisdictional Statement C2-C3). Appellants contend that the asserted imbalances in senatorial representation are not so substantial as to require the recomposition of that body.[2]

The use of a three-fifths ratio for additional senatorial representation rather than a simple majority fraction is neither arbitrary nor invidious. The choice of the higher fraction was made in order to avoid an even greater grouping of smaller counties which would unduly broaden the geographical area represented by each senator in multi-county districts. Nothing in the Fourteenth Amendment authorizes the adoption of the so-called "majority fraction rule" or, for that matter, any fraction less than a full ratio for purposes of apportioning the Senate.

Appellees cannot avoid the fact that the 11 largest urban counties containing approximately 59 percent of the total population of the State elect a majority of the Senate. And, when all 18 counties which contain large, urban and suburban areas, each of which have populations in excess of 200,000, are considered, it appears that 70.3 percent of the total population of the State elects 70.2 percent of

[2] Further, it should be noted that none of these three counties was the target of discriminatory under-representation in the House of Representatives.

the Senate (Jurisdictional Statement A14-A16). Compliance with the population principle requires no more perfect equality of representation.

IV. THE CONSTITUTIONALITY OF THE PENNSYLVANIA SENATORIAL APPORTIONMENT ACT AND OF THE PROVISIONS OF THE PENNSYLVANIA HOUSE APPORTIONMENT ACT RELATING TO MULTI-MEMBER DISTRICTS ARE NECESSARILY AT ISSUE IN THIS APPEAL

Appellees urge that in view of the alleged invalidity of the House Apportionment Act, this Court "need not pass upon the apportionment of the Pennsylvania Senate" because there is "no evidence that the Pennsylvania legislation is severable".

Appellees' contention is apparently based upon a misreading of *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 84 S. Ct. 1472, 1458 (1964). The Colorado Legislature in 1963 had enacted a single statute reapportioning both the House of Representatives and the Senate. 84 S. Ct. at 1481, n. 15. Holding that the apportionment of Senate seats was constitutionally impermissible, this Court refused to consider the House apportionment in the absence of an "indication that the apportionment of the two houses of the Colorado General Assembly, pursuant to the 1962 constitutional amendment, is severable". 84 S. Ct. at 1485.

The abstention in *Lucas* can have no relevance to the instant appeal. The "Pennsylvania legislation" consists of two independent acts separately adopted by the General Assembly and separately signed into law by the Governor. (See Jurisdictional Statement B4, B27.) The Appellees'

monologue about "severability" is, thus, without meaning. There is nothing to sever.

The Appellees also ask this Court to refrain from considering the constitutionality of the provisions of the Pennsylvania House Apportionment Act establishing multi-member districts. This request is delivered "for the reasons stated * * * with regard to the Pennsylvania Senate" (sic) (Motion To Affirm, p. 20). But here on the issue of severability Appellees are confronted with the clear mandate of the General Assembly that "the provisions of every law shall be severable". Statutory Construction Act of May 28, 1937, P.L. 1019, Art. IV, Section 55, Pa. Stat. Ann., tit. 46, §555 (Purdon 1952).

The District Court held that a legislative body cannot be constructed of both single-member and multi-member districts, at least not unless "justified" by appropriate explanation (229 F. Supp. at 326, Jurisdictional Statement A38).

Thus, were the court below upheld in its judgment that population disparities invalidate the present apportionment of the House of Representatives, its ruling with respect to multi-member districts would be obligatory in the framing of a new apportionment plan. Patently, therefore, this issue must necessarily be considered by this Court in the disposition of the present appeal.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Appellees' Motion To Affirm be denied.

Respectfully submitted,
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APPENDIX A

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 201

WILLIAM W. SCRANTON, Governor et al., *Appellants*

v.

IRA WALTON DREW et al., *Appellees*

On Appeal from the United States District Court for the Middle District of Pennsylvania.

BRIEF IN OPPOSITION TO APPLICATION FOR REMAND

On April 9, 1964, the District Court entered its judgment, *inter alia*, declaring the Pennsylvania Apportionment Laws and the provisions of the State Constitution under which they were enacted violative of the Fourteenth Amendment to the Federal Constitution and enjoining Appellants from conducting both the 1964 legislative primary and general elections thereunder.

Promptly thereafter, Appellants moved for a stay of the District Court's order pending disposition of its prospective appeal to this Court.

After exhaustive argument by counsel and full consideration by the District Court, Appellants' motion was granted and a stay entered on April 14, 1964. The order provided:

> "* * * the stay hereby granted shall continue in effect pending the final determination of such appeal and until the receipt by this court of the mandate of the Supreme Court with respect thereto."

In the instant Application Appellees seek to have the record remanded "with instructions to the three-judge court to consider vacation of the stay heretofore granted and the grant of such further relief as may be appropriate and thereafter to return the said record to this Court for final disposition of the appeal". The Application is thus a thinly camouflaged attempt to obtain reargument of the District Court's order staying its injunction.

Nothing in *Reynolds v. Sims*, 32 L.W. 4535, and companion cases obviates the necessity for hearing the present appeal, nor do the opinions in any way resolve the unique issues raised herein.

On the contrary, as Chief Justice Warren observed in *Reynolds:*

> "For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be

unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. Slaughter-House Cases, 16 Wall. 36, 78-79. Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant." 32 L.W. 4547-4548

Moreover, contrary to the discriminatory legislative apportionments existing in Alabama *et al.*, whatever deviations from the Equal-Population Principle exist under the Commonwealth's present representational framework are clearly insubstantial (see Jurisdictional Statement, pp. 15-18), and, even these deviations are plainly permissible as valid accommodations of the interest of the State in preserving the county as the basic representational unit.

Again, referring to Chief Justice Warren's opinion in *Reynolds:*

"Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population

principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

• • • • • • •

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."

• • • • • • •

"So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature."

"A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of

population among districts is maintained." 32 L.W. 4547, 4548

If the *Reynolds* opinion is in any way controlling on this appeal, it is with respect to that portion of the opinion of the court below which declares invalid the provisions of the Pennsylvania Apportionment Laws establishing both single and multi-member representative districts. That the District Court erred in so holding is manifest from the following passage of the Chief Justice's opinion:

> "One body could be composed of single-member districts while the other could have at least some multi-member districts." 32 L.W. 4547

The equitable considerations which motivated the District Court's grant of a stay in these proceedings remain as potent as they were three months ago, and, indeed, with the passage of time, have heightened cogency. Nominations have been filed, primaries have been held, candidates selected and the general election campaign has already commenced. To halt the electoral machinery and fabricate a new apportionment scheme for the General Assembly operative in the forthcoming November elections would result in confusion compounded. Were this Court to grant the Appellee's Application and the District Court to take the action requested, Appellants would be obliged to request this Court to impose a supersedeas on the District Court's mandate so as to preserve political sanity and protect the rights of the Commonwealth's voters and of the candidates for legislative office.

For the foregoing reasons Appellants respectfully request that the Application for Remand be denied.

Respectfully submitted,

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Dated: July 6, 1964

Certificate of Service

I, Alan Miles Ruben, one of the attorneys for William W. Scranton, Governor, et al., Appellants herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 6th day of July, 1964, I served copies of the foregoing Brief in Opposition to Application for Remand on the several parties thereto, by depositing copies thereof in the United States Post Office at Harrisburg, Pennsylvania, correctly addressed, with first class postage prepaid, to their respective attorneys of record at their respective post office addresses as follows:

Appendix A

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SUPPLEMENT TO JURISDICTIONAL STATEMENT

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October Term, 1964
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Appellants

v.

IRA WALTON DREW, et al.,
Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania.

SUPPLEMENT TO JURISDICTIONAL STATEMENT

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IN THE
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October Term, 1964
No. 201

WILLIAM W. SCRANTON, Governor et al.,
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v.

IRA WALTON DREW et al.,
Appellees

On Appeal from the United States District Court for the Middle District of Pennsylvania

SUPPLEMENT TO JURISDICTIONAL STATEMENT

This Supplement to the Jurisdictional Statement is filed to bring to the Court's attention the unanimous decision of the Supreme Court of Pennsylvania in *Butcher et al. v. Bloom et al.*, No. 198 Miscellaneous Docket, September 29, 1964.[1] Therein the state tribunal held that the Pennsylvania legislative apportionment laws, at issue in this appeal, were invalid as repugnant to the Fourteenth Amendment to the Federal Constitution.

[1] The opinion is printed as Appendix "A" hereto.

However, in reaching this conclusion the State Supreme Court concluded:

"It is obvious that the Pennsylvania Legislature cannot properly act to reapportion itself in the short time remaining before the election of November 3, 1964, and months after the April 28, 1964 primary election. We do believe, however, that the Legislature made an earnest effort to reapportion itself in 1963. Unfortunately, it was then without the benefit of the views of the Supreme Court of the United States expressed in the *Reynolds* cases and without an interpretation by this Court of important and relevant provisions of the Pennsylvania Constitution. Serious disruption of orderly state election processes and basic governmental functions would result from immediate action by any judicial tribunal restraining or interfering with the normal operation of the election machinery at this late date. The Legislature should not be denied a reasonable opportunity to enact new reapportionment legislation. We therefore hold that the 1964 election of Pennsylvania legislators should and must be conducted pursuant to the Acts of January 9, 1964, Nos. 1 and 2.[19] Under no circumstances, however, may the 1966 election of members of the Pennsylvania Legislature be conducted pursuant to a constitutionally invalid plan." (A 29-30.)

* * * * * * * * *

"Should the Legislature fail to enact a constitutionally valid plan of reapportionment as soon as practical, but not later than September 1, 1965, we shall

[19] Footnote omitted.

take such action as may be appropriate in light of the then existing situation." (A 39-40.)

Appellants have previously shown in their Jurisdictional Statement and Reply Brief that the District Court's decision and suggested apportionment scheme is inconsistent with the principles set down by this Court in *Reynolds* and companion cases; it now appears that the District Court's thinking is also out of tune with the interpretation of the provisions of the Pennsylvania Constitution controlling apportionment of the General Assembly made by the Pennsylvania Supreme Court in *Butcher*."

It will be recalled that the District Court giving literal meaning and mandatory effect to Sections 16 and 17 of Article II of the Pennsylvania Constitution declared these provisions invalid as contravening the requirements of the Fourteenth Amendment. But the Pennsylvania Supreme Court decided:

> "Our interpretation of the relevant provisions of the Pennsylvania Constitution makes mandatory only such requirements as are in harmony with the Fourteenth Amendment to the Constitution of the United States." (A 39.)

With respect to the first of these sections, the Pennsylvania Supreme Court held:

> "It is our view that Section 16, when construed as a whole, demands that Senate apportionment legislation respect county lines and lines of other political subdivisions (such as wards, boroughs, and townships), insofar as possible, without doing violence to the population principle enunciated by the first

sentence of Section 16 and also by the Fourteenth Amendment to the Federal Constitution." (A 33.)

"We hold, therefore, that Article II, Section 16 of the Pennsylvania Constitution requires that senatorial reapportionment legislation must maintain the integrity of counties and other political subdivisions, insofar as possible, and must provide for compact districts of contiguous territory, *subject always to the overriding objective and mandate that such districts shall be 'as nearly equal in population as may be.'* We must emphasize that, if necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the population principle cannot otherwise be satisfied. *Furthermore, the number of senators per political subdivision may not be limited if such limitation violates the equal-population principle.*" (A 33-34.) (Emphasis supplied.)

In turning to the latter section, the Court reasoned:

"It is clear that the first sentence of Section 17 is in accord with the requirements of the federal constitution. It expressly recognizes the equal-population principle as the controlling factor in apportioning the House of Representatives." (A 35.)

"The requirement that apportionment should be among the several counties further signifies an intention to respect county lines and to utilize counties as *units of representation to the maximum extent consistent with the equal-population principle.* Indeed, Section 17, when considered as a whole, demands that

the boundaries of all political subdivisions be respected when not in conflict with the overriding population principle. It must be interpreted to require that counties with small populations, if necessary, be joined with other counties for the purpose of electing and sharing a representative. *We hold that no provision of Section 17 prohibits the division or combination of counties in the formation of districts where the population principle cannot otherwise be satisfied.*" (A 35.) (Emphasis supplied.)

Well established principles of federal abstinence and deference to state jurisdiction in cases involving the interpretation of a state constitution dictate that the present controversy be resolved in the Pennsylvania tribunal pursuant to the judgment of the Pennsylvania Supreme Court in *Butcher*. Moreover, primary responsibility for the fashioning of a representational framework belongs to the General Assembly which, by virtue of its composition, experience, and facilities is the most competent and appropriate body to perform this task. As the Pennsylvania Supreme Court recomends, the Legislature ought to be given an opportunity with the benefit of this Court's decision in *Reynolds*, and the Pennsylvania Supreme Court's decision in *Butcher* to enact apportionment legislation consonant with the requirements of the Fourteenth Amendment.

Appellants believe that the decision of the Supreme Court of Pennsylvania lays down sound guidelines, as the opinion of the District Court did not, which the General Assembly may follow in drafting new apportionment legislation. For this reason Appellants herein consider themselves bound to obey the mandate of the Pennsylvania

Supreme Court in *Butcher* and Appellant George I. Bloom hereby expressly waives his right of appeal to this Court from that decision.

Appellants therefore request this Court to take jurisdiction of the present appeal, to vacate the judgment of the District Court, and to retain jurisdiction pending compliance by the Appellants and the General Assembly of Pennsylvania with the judgment of the Pennsylvania Supreme Court in *Butcher*.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA

Middle District

No. 198 Miscellaneous Docket

Harry K. Butcher, 6069 Drexel Road, Philadelphia, Pennsylvania; Donald C. Rubel, 606 Westview Avenue, Philadelphia, Pennsylvania; and Anne D. McKinley, Apt. 293, Carl Mackley Apartments, "M" and Bristol Streets, Philadelphia 24, Pennsylvania; Citizens, Duly Qualified Electors and Taxpayers of the Commonwealth of Pennsylvania and of the City and County of Philadelphia, for themselves and for any other Taxpayers and Electors who may desire to join as parties-plaintiff,

Plaintiffs

v.

George I. Bloom, Secretary of the Commonwealth of Pennsylvania, Successor to E. James Trimarchi, Jr.,

Defendant

George T. Kelton and Jack Sirott,

Intervenors

Certiorari from the Court of Common Pleas of Dauphin County, No. 151, Commonwealth Docket, 1962

OPINION OF THE COURT

Roberts, J., Filed: September 29, 1964:

I.

At issue in this litigation is the constitutional validity, under the Fourteenth Amendment to the Federal Constitution, of the present apportionment of seats in both houses of the Pennsylvania Legislature.

On March 30, 1962, plaintiffs, Pennsylvania taxpayers and electors, filed complaints in equity in the Court of Common Pleas of Dauphin County against the Secretary of the Commonwealth. The complaints sought that defendant be restrained from taking any steps toward the holding of elections for state legislative offices under the provisions of the existing apportionments acts[1] on the ground that the acts violated certain provisions of the Pennsylvania and Federal Constitutions.[2] After an answer was filed by defendant, plaintiffs moved for judgment on the pleadings. The motion was denied on June 13, 1962. However, the Court of Common Pleas retained jurisdiction of the action, held the issues concerning reapportionment to be justiciable, and refused to adjudicate

---

[1] Act of May 10, 1921, P. L. 449, as amended, 25 P.S. §2201 (pertaining to the apportionment of Senate districts); Act of July 29, 1953, P. L. 956, 25 P.S. §2215 (pertaining to the apportionment of House districts).

[2] The complaint in this action was amended on December 13, 1963, to include an attack on Sections 16 and 17 of Article II of the Pennsylvania Constitution as well as upon proposed senatorial and representative reapportionment bills pending in the Legislature. On February 4, 1964, plaintiffs filed their second amended complaint which clarified the issues raised.

them until the Legislature had an oportunity to enact appropriate legislation at its forthcoming sessions.[3] On November 12, 1963, a special session of the General Assembly was convened for the purpose of considering reapportionment legislation. Subsequently, two reapportionment bills, the Act of January 9, 1964, No. 1, P. L. , 25 P.S. §2221 (Supp. 1963), and the Act of January 9, 1964, No. 2, P. L. , 25 P.S. §2217 (Supp. 1963), were passed and approved by the Governor.[4]

On January 14, 1964, plaintiffs petitioned the Supreme Court of Pennsylvania to take immediate jurisdiction of this case, and on January 15, we granted plaintiffs' petition and issued a Special Writ of Certiorari to the Court of Common Pleas of Dauphin County. We also permitted intervention by two residents of Bucks County who filed a separate complaint averring, inter alia, that the First Legislative District of Bucks County is not compact within the meaning of Article II, Section 17, of the Pennsylvania Constitution and that they are denied fair and equal representation as required by Section 1 of the Fourteenth Amendment to the United States Constitution. On January 24, 1964, we remanded the matter to the Dauphin County court with directions to hold a hearing forthwith, to allow any pertinent amendment and any proper intervention, to make all necessary and appropriate findings of fact, and to remit its findings and report to this Court as expeditiously as possible. On March 19, 1964, after several hearings in that court, the hearing judge

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[3] *Butcher v. Trimarchi*, 28 D. & C. 2d 537 (C.P. Dauphin Co. 1962).

[4] Act No. 1 provides for apportionment of the House, Act No. 2 of the Senate.

filed a report and findings of fact. On April 7, 1964, oral argument was held before this Court.

II.

In considering this case, we are aware that a similar proceeding was instituted in the United States District Court for the Middle District of Pennsylvania on November 22, 1963.[6] On April 9, 1964, that three-judge court filed findings of fact, conclusions of law, and an opinion holding the Pennsylvania Reapportionment Acts of January 9, 1964, and certain provisions of the Pennsylvania Constitution to be violative of the Fourteenth Amendment to the Federal Constitution. Accordingly, it enjoined various state officials from conducting elections pursuant thereto. That court retained jurisdiction of the matter pending enactment of a valid reapportionment plan by the General Assembly or, in default thereof, by its own decree or in some other lawful manner. At the same time, it announced that it would reconvene in Philadelphia on June 1, 1964, to consider any further relief which might be necessary. On April 14, 1964, a stay of the federal district court order was granted pending appeal to the Supreme Court of the United States.

III.

For many reasons, we believe that we should decide the issues presented and provide necessary remedies for achieving valid reapportionment. In the presence of the demonstrated willingness of the Legislature[7] to act and the willingness of our courts to assume jurisdiction, the

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[6] *Drew v. Scranton*, 229 F. Supp. 310 (M.D. Pa. 1964), *appeal docketed*, 33 U.S.L. Week 3047 (U.S. June 19, 1964) (No. 201).

[7] See note 7, infra.

federal district court should be relieved of responsibility in this matter for a period sufficient to allow such remedies to become effective. In assuming the responsibility of securing, in a timely fashion, a reapportionment plan which would meet the requirements of the Federal and State Constitutions, we have taken literally the words of the Supreme Court of the United States: "*We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes.*" *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. , , 84 S. Ct. 1442, 1451-52 (1964). (Emphasis supplied.)

This suit challenges the recent Pennsylvania Reapportionment Acts and the election of state senators and representatives thereunder. More importantly, it challenges—in light of recent decisions interpreting the Constitution of the United States—the validity of certain provisions of the Constitution of Pennsylvania which establish the legislative branch of government. It presents one of the most important constitutional questions ever raised in the history of this Commonwealth. It involves the basic rights of the citizens of Pennsylvania in the election of their state law makers. Historically and logically, this Court is the most appropriate forum to determine the issues presented and to fashion suitable remedies. Proper and continuing respect for federal-state judicial relationships necessitates consideration by the Supreme Court of Pennsylvania of the relevant state statutes and state constitutional provisions, subject, of course, to review by the Supreme Court of the United States.

Furthermore, jurisdiction with respect to the matters involved was obtained by the Court of Common Pleas of

Dauphin County prior to the federal district court, and both the former court and this Court have acted diligently in light of all the circumstances of this case. After the initial complaints were filed in March, 1962, the common pleas court postponed adjudication of the issues involved in order to give the Legislature an opportunity to act at its forthcoming session. At a special session in 1963, the General Assembly enacted reapportionment legislation, and, immediately thereafter, this Court assumed jurisdiction of this case, received findings of fact and a report based on hearing before the Dauphin County court, and promptly heard argument. Meanwhile, the federal district court, denied an application for a preliminary injunction which would have restrained state officials from conducting any election for state legislative office, pending final enactment by the General Assembly of reapportionment legislation then being considered.[7] Therefore, both the federal court and the state courts postponed judicial action while awaiting the final passage of the Pennsylvania Reapportionment Acts; both acted promptly in

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[7] This case must be contrasted with *Lucas v. Forty-Fourth General Assembly of State of Colorado*, U.S. , n.3, 84 S. Ct. 1472, 1476, n.3 (1964), where the Supreme Court of the United States quoted, with approval, the position of the federal district court, which refused to abstain: "The considerations which demand abstinence are not present in the instant case. Here, the General Assembly of the State of Colorado has repeatedly refused to perform the mandate imposed by the Colorado Constitution to apportion the legislature. The likelihood that the unapportioned General Assembly will ever apportion itself now appears remote. The Supreme Court of Colorado, while retaining jurisdiction of the subject matter of the controversy presented to it, has postponed further consideration of the cause until June, 1963. Un-

their respective cases in the Spring of 1964.[8] Further immediate action by us was made unnecessary by the stay of the federal order, granted April 14, 1964, pending appeal to the Supreme Court of the United States. Thus, we were given the opportunity to await opinions of that Court in related cases concerning reapportionment in other states before rendering a decision in the instant case.

It is obvious, of course, that the federal district court's decision of April 9, 1964, was made without the benefit of this Court's interpretation of relevant Pennsylvania constitutional provisions, and, more importantly, without the benefit of recent crucial and controlling decisions announced by the Supreme Court of the United States on June 15, 1964.[9] We believe, for reasons which will appear later in our opinion, that reliance on all that was said

der these circumstances, we must conclude that the parties do not, at least at present, have an adequate, speedy and complete remedy apart from that asserted in the case at bar and thus grounds for abstention are at this time lacking."

[8] As already indicated, this Court heard arguments on April 7, 1964. The federal district court filed its findings, opinion and order two days later.

[9] *Reynolds v. Sims*, U.S. , 84 S. Ct. 1362 (1964); *W.M.C.A., Inc. v. Lomenzo*, U.S. , 84 S. Ct. 1418 (1964); *Maryland Committee for Fair Representation v. Tawes*, U.S. , 84 S. Ct. 1442 (1964); *Davis v. Mann*, U.S. , 84 S. Ct. 1453 (1964); *Roman v. Sincock*, U.S. , 84 S. Ct. 1462 (1964); *Lucas v. Forty-Fourth General Assembly of State of Colorado*, U.S. , 84 S. Ct. 1472 (1964).

These cases shall hereinafter be referred to as the "*Reynolds* cases." The cases deal with the following states respectively, Alabama, New York, Maryland, Virginia, Delaware and Colorado.

and directed in the opinion of the district court, although excellent in many respects, would be constitutionally unsafe.

The General Assembly of Pennsylvania is entitled to an opportunity to enact reapportionment legislation pursuant to the recent *Reynolds* cases and to our interpretation here of pertinent provisions of the Pennsylvania Constitution. Since the Legislature is intimately acquainted with the characteristics of Pennsylvania and is primarily responsible for constitutional apportionment, action by that body, taken promptly and in good faith, is more likely to achieve a workable, constitutionally acceptable result than an apportionment following the suggested plan of the district court.

IV.

The Supreme Court of the United States has held that "seats in both houses of a bicameral state legislature must be apportioned on a population basis";[10] that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a susbtantial fashion diluted when compared with votes of citizens living in other parts of the State";[11] that "diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based on factors, such as race . . . or economic status";[12] and that state legislative districting schemes which give the same number

[10] *Reynolds v. Sims*, U.S. , , 84 S. Ct. 1362, 1385 (1964).

[11] *Ibid.*

[12] *Id.* at , 84 S. Ct. at 1384.

of representatives to unequal numbers of constituents would not be constitutionally sustainable.[13]

The Act of January 9, 1964, No. 1, which fixes the number of representatives at 209 divides the state into districts as follows:

(Population ratio based on division by 200 : 56,597)

County	District No.	District Total	No. Representatives	Population per Representative
Philadelphia	1	57,507	1	57,507
	2	123,445	2	61,722
	3	50,896	1	50,896
	4	52,246	1	52,246
	5	118,067	2	59,033
	6	59,203	1	59,203
	7	105,037	2	52,519
	8	66,017	1	66,017
	9	68,833	1	68,833
	10	53,550	1	53,550
	11	59,483	1	59,483
	12	166,944	3	55,648
	13	54,497	1	54,497
	14	50,616	1	50,616
	15	53,563	1	53,563
	16	51,055	1	51,055
	17	98,598	2	49,299
	18	65,622	1	65,622
	19	64,956	1	64,956
	20	53,986	1	53,986
	21	114,280	2	57,140

[13] *Id.* at , 84 S. Ct. at 1382.

County	District No.	District Total	No. Representatives	Population per Representative
	22	42,761	1	42,761
	23	64,982	1	64,982
	24	48,898	1	48,898
	25	137,260	2	68,630
	26	120,210	2	60,105
Adams		51,906	1	51,906
Allegheny	1	137,544	2	68,772
	2	50,690	1	50,690
	3	49,644	1	49,644
	4	49,413	1	49,413
	5	47,301	1	47,301
	6	132,115	2	66,058
	7	143,605	2	71,802
	8	53,515	1	53,515
	9	111,365	2	55,682
	10	63,944	1	63,944
	11	127,373	2	63,687
	12	62,839	1	62,839
	13	60,727	1	60,727
	14	235,672	4	58,918
	15	153,108	3	51,036
	16	150,968	1	50,322
Armstrong		79,524	1	79,524
Beaver	1	102,521	2	51,260
	2	104,427	2	52,213
Bedford		42,451	1	42,451
Berks	1	48,551	1	48,551
	2	59,639	1	59,639
	3	56,817	1	56,817
	4	60,781	1	60,781

County	District No.	District Total	No. Representatives	Population per Representative
	3	49,626	1	49,626
Blair	1	69,407	1	69,407
	2	67,863	1	67,863
Bradford		54,925	1	54,925
Bucks	1	236,905	4	59,226
	2	71,662	1	71,662
Butler	1	58,819	1	58,819
	2	55,820	1	55,820
Cambria	1	56,756	1	56,756
	2	95,114	2	47,557
	3	51,413	1	51,413
Cameron		7,586	1	7,586
Carbon		52,889	1	52,889
Centre		78,580	1	78,580
Chester	1	105,824	2	52,912
	2	104,784	2	52,392
Clarion		37,408	1	37,408
Clearfield		81,534	1	81,534
Clinton		37,619	1	37,619
Columbia		53,489	1	53,489
Crawford		77,956	1	77,956
Cumberland	1	62,193	1	62,193
	2	62,623	1	62,623
Dauphin	1	79,697	1	79,697
	2	140,558	3	46,853
Delaware	1	63,658	1	63,658
	2	255,556	4	63,889
	3	233,940	4	58,485
Elk		37,328	1	37,328
Erie	1	69,946	1	69,946

County	District No.	District Total	No. Representatives	Population per Representative
	2	68,494	1	68,494
	3	112,242	2	56,121
Fayette	1	56,971	1	56,971
	2	112,369	2	56,184
Forest		4,485	1	4,485
Franklin	1	44,617	1	44,617
	2	43,555	1	43,555
Fulton		10,597	1	10,597
Greene		39,424	1	39,424
Huntingdon		39,457	1	39,457
Indiana		75,366	1	75,366
Jefferson		46,792	1	46,792
Juniata		15,874	1	15,874
Lackawanna	1	55,074	1	55,074
	2	56,369	1	56,369
	3	67,164	1	67,164
	4	55,924	1	55,924
Lancaster	1	61,055	1	61,055
	2	217,304	4	54,326
Lawrence	1	53,353	1	53,353
	2	59,612	1	59,612
Lebanon		90,853	2	45,427
Lehigh	1	108,347	2	54,173
	2	119,189	2	59,594
Luzerne	1	55,300	1	55,300
	2	56,124	1	56,124
	3	55,926	1	55,926
	4	58,929	1	58,929
	5	57,142	1	57,142
	6	63,551	1	63,551

County	District No.	District Total	No. Representatives	Population per Representative
Lycoming	1	51,014	1	51,014
	2	58,353	1	58,353
Mercer	1	61,209	1	61,209
	2	66,310	1	66,310
McKean		54,517	1	54,517
Mifflin		44,348	1	44,348
Monroe		39,567	1	39,567
Montgomery	1	99,444	2	49,722
	2	128,234	2	64,117
	3	134,560	2	67,280
	4	154,444	3	51,481
Montour		16,730	1	16,730
Northampton	1	55,325	1	55,325
	2	52,438	1	52,438
	3	93,...	2	46,824
Northumberland	1	50,422	1	50,422
	2	53,716	1	53,716
Perry		26,582	1	26,582
Pike		9,158	1	9,158
Potter		16,483	1	16,483
Schuylkill	1	64,196	1	64,196
	2	108,831	2	54,416
Snyder		25,922	1	25,922
Somerset		77,450	1	77,450
Sullivan		6,251	1	6,251
Susquehanna		33,137	1	33,137
Tioga		36,614	1	36,614
Union		25,646	1	25,646
Venango		65,295	1	65,295
Warren		45,582	1	45,582

County	District No.	District Total	No. Representatives	Population per Representative
Washington	1	108,030	2	54,015
	2	109,241	2	54,620
Wayne		28,237	1	28,237
Westmoreland	1	64,337	1	64,337
	2	58,224	1	58,224
	3	60,717	1	60,717
	4	57,659	1	57,659
	5	49,827	1	49,827
	6	61,865	1	61,865
Wyoming		16,813	1	16,813
York	1	54,504	1	54,504
	2	64,744	1	64,744
	3	57,176	1	57,176
	4	61,882	1	61,882

An examination of the foregoing apportionment of representatives indicates quite clearly that in numerous instances the same number of representatives is allotted to unequal numbers of constituents. We realize, as does the Supreme Court of the United States, "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters," and that "mathematical exactness or precision is hardly a workable constitutional requirement."[12] But the present districting scheme does not meet that requirement of the Fourteenth Amendment which "demands no less than substantially equal state legislative representation for all citizens of all places. . . ."[13]

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[12] *Id.* at , 84 S. Ct. at 1390.
[13] *Id.* at , 84 S. Ct. at 1385.

Several vivid examples, by no means exhaustive, illustrate the gross disparities which exist under the Act. Twelve counties, namely Clearfield, with a population of 81,534; Armstrong, with a population of 79,524; Centre, with a population of 78,580; Crawford, with a population of 77,956; Somerset, with a population of 77,450; Indiana, with a population of 75,366, Venango, with a population of 65,295; Bradford, with a population of 54,925; McKean, with a population of 54,517; Columbia, with a population of 53,489; Carbon, with a population of 52,889; and Adams, with a population of 51,906, are assigned only one representative each. Twelve other counties, namely, Forest, with a population of 4,485; Sullivan, with a population of 6,251; Cameron, with a population of 7,586; Pike, with a population of 9,158; Fulton, with a population of 10,597; Juniata, with a population of 15,874; Potter, with a population of 16,483; Montour, with a population of 16,730; Wyoming, with a population of 16,813; Snyder, with a population of 25,922; Union, with a population of 25,646; and Perry, with a population of 26,582, are also assigned one representative each. Furthermore, thirteen other counties, ranging in populations from a low of 28,237, to a high of 46,792, are also assigned one representative each.[18] These examples show, by cursory analysis, the existence of at least thirty-seven districts which differ widely in population but are equal in representation.

In examining the districts established by the Act, it is apparent that many population disparities resulted

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[18] Jefferson, 46,792; Warren, 45,582; Mifflin, 44,348; Bedford, 42,451; Monroe, 39,567; Huntingdon, 39,457; Greene, 39,424; Clinton 37,619; Clarion, 37,408; Elk, 37,328; Tioga, 36,614; Susquehanna, 33,137; and Wayne, 28,237.

from an allocation by the Legislature of at least one representative to each county in the state regardless of the population of that county. This allocation resulted from the assumption that the heretofore unquestioned pattern of one representative per county was mandated by the Pennsylvania Constitution, Article II, Section 17. Although the Supreme Court of the United States has recognized that "a consideration that appears to be of more substance in justifying some deviation from population-based representation in legislatures is that of insuring some voice to political subdivisions . . .,"[17] that Court has made it clear that "permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population."[18] The Supreme Court of the United States has stated:

> "Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in a legislative body being apportioned does not significantly exceed the number of counties. . . . [I]f, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legis-

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[17] *Reynolds v. Sims*, U.S. , , 84 S. Ct. 1362, 1391 (1964).

[18] *Ibid.*

lative body, then the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." *Reynolds v. Sims*, 377 U.S. , 84 S. Ct. 1362, 1391-92 (1964).

Careful consideration of the legislative districting scheme embodied in the Pennsylvania Reapportionment Act, No. 1, as well as the populations of all of Pennsylvania's counties, compels us to rule that assignment of one seat to each county, regardless of population, results in the submergence of population as the controlling consideration in apportionment and is offensive to the Fourteenth Amendment to the Constitution of the United States. It must therefore be concluded that the Act of January 9, 1964, No. 1 (which provides for reapportionment of the House of Representatives), by substantially diluting the right to vote of individuals in some districts when compared with the rights of voters in other districts, is constitutionally insufficient.

V.

As we have indicated, the Supreme Court of the United States has held that reapportionment of both houses in a bicameral legislature must be based on population. The Act of January 9, 1964, No. 2, apportions the State Senate into senatorial districts, as follows:

(Population ratio per Senator: 226,387)

District No.	*County*	*1960 Population*	*No. of Senators*
1	Philadelphia (part)	260,767	1
2	Philadelphia (part)	255,869	1
3	Philadelphia (part)	251,415	1

District No.	*County*	*1960 Population*	*No. of Senators*
4	Philadelphia (part)	241,032	1
5	Philadelphia (part)	236,148	1
6	Philadelphia (part)	242,667	1
7	Philadelphia (part)	266,242	1
8	Philadelphia (part)	248,372	1
37	Allegheny (part)	236,359	1
38	Allegheny (part)	233,003	1
40	Allegheny (part)	241,633	1
42	Allegheny (part)	226,269	1
43	Allegheny (part)	237,367	1
44	Allegheny (part)	233,086	1
45	Allegheny (part)	222,104	1
9	Delaware (part)	255,888	1
26	Delaware (part)	297,266	1
12	Montgomery (part)	262,794	1
17	Montgomery (part)	253,888	1
39	Westmoreland	352,629	1
20	Luzerne	346,972	1
10	Bucks	308,567	1
13	Lancaster	278,359	1
11	Berks	275,414	1
29	Schuylkill, Lebanon	263,880	1
49	Erie	250,682	1
28	York	238,336	1
22	Lackawanna	234,531	1
21	Butler, Lawrence	227,604	1
16	Lehigh	227,536	1
15	Dauphin	220,255	1
46	Washington	217,271	1

District No.	County	1960 Population	No. of Senators
31	Mifflin, Juniata, Perry Cumberland	211,620	1
19	Chester	210,608	1
32	Fayette, Greene	208,764	1
47	Beaver	206,948	1
50	Mercer, Crawford	205,475	1
35	Cambria	203,283	1
41	Jefferson, Armstrong, Indiana	201,682	1
18	Northampton	201,412	1
24	Columbia, Lycoming, Montour	179,586	1
30	Blair, Huntingdon	176,727	1
25	Potter, McKean, Warren Clinton, Cameron	161,787	1
34	Centre, Clearfield	160,114	1
27	Northumberland, Snyder, Union	155,706	1
23	Bradford, Susquehanna, Tioga, Wyoming, Sullivan	147,740	1
48	Elk, Forest, Clarion, Venango	144,516	1
33	Franklin, Adams	140,078	1
36	Bedford, Fulton, Somerset	130,498	1
14	Carbon, Monroe, Pike Wayne	129,851	1

Examination of the foregoing senatorial districts shows that, in many instances, they contain widely varying numbers of people. Some examples of gross disparities in population can be cited. The tenth district on-

sisting of Bucks, with a population of 308,567; the twentieth district consisting of Luzerne, with a population of 346,972; the thirty-ninth district consisting of Westmoreland, with a population of 352,629, are each represented by one senator. The fourteenth district consisting of Carbon, Monroe, Pike and Wayne, with a population of 129,851; the thirty-sixth district consisting of Bedford, Fulton, and Somerset, with a population of 130,498; the thirty-third district consisting of Franklin and Adams, with a population of 140,078; the forty-eighth district consisting of Elk, Forest, Clarion, and Venango, with a population of 144,516; the twenty-third district consisting of Bradford, Susquehanna, Tioga, Wyoming, and Sullivan, with a population of 147,740, are each represented by one senator. In the examples just cited, senators from the tenth, twentieth, and thirty-ninth districts each represent more than two times as many people as do senators from each of the other districts.

In *Reynolds v. Sims*, 377 U.S. , 84 S. Ct. 1362, 1382 (1964), the Supreme Court of the United States said: "If a state should provide that the votes of citizens in one part of the state should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote in the disfavored areas had not been effectively diluted."

Careful consideration of the entire legislative districting scheme for the Pennsylvania Senate, including not only the districts which we have cited above, but other districts as well, requires us to conclude that the Act of January 9, 1964, No. 2, which provides for reapportionment of the Senate by substantially diluting the right to vote

of individuals in some districts when compared with the rights of voters in other districts, fails to meet the requirements of the Fourteenth Amendment to the Constitution of the United States.

VI.

In light of our conclusion that the Acts of January 9, 1964, Nos. 1 and 2, are constitutionally insufficient, we have given much consideration to the remedy which should be granted. Recent decisions of the Supreme Court of the United States make it clear that it is for us to determine "whether the imminence of the 1964 . . . general elections requires the utilization of the apportionment scheme contained" in those acts notwithstanding their invalidity, as the following excerpts indicate:

> "Since primary responsibility for legislative apportionment rests with the legislature itself and since adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action *only if the legislature fails to enact* a constitutionally valid state legislative apportionment scheme in a timely fashion *after being afforded a further opportunity by the courts to do so.* However, under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan. We therefore reverse the judgment of the Maryland Court of Appeals, and remand the case to that Court for further proceedings not inconsistent with the views stated here and in our opinion in Reynolds v. Sims." (Emphasis supplied.)

Maryland Committee for Fair Representation v. Tawes, 377 U.S. . . , 84 S. Ct. 1442, 1452-53 (1964).

"Since all members of both houses of the New York Legislature will be elected in November 1964, the court below, acting under equitable principles, must now determine whether, because of the imminence of that election and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted pursuant to the existing provisions, or whether under the circumstances the effectuation of appellants' right to a properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election."

WMCA, Inc. v. Lomenzo, 377 U.S. . . , 84 S. Ct. 1418, 1429 (1964).

"Since the apportionment of seats in the Colorado Legislature . . . fails to comport with the requirements of the Equal Protection Clause, the decision below must be reversed. Beyond what we said in our opinion in Reynolds, we express no views on questions relating to remedies at the present time. On remand, the District Court must now determine whether the imminence of the 1964 primary and general elections requires that utilization of the apportionment scheme contained in the constitutional amendment be permitted; for purposes of those elections, or whether the circumstances in Colorado are such that appellants' right to cast adequately weighted votes for mem-

bers of the State Legislature can practicably be effectuated in 1964."

> *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. , , 84 S.Ct. 1472, 1487-88 (1964).

It is obvious that the Pennsylvania Legislature cannot properly act to reapportion itself in the short time remaining before the election of November 3, 1964, and months after the April 28, 1964 primary election. We do believe, however, that the Legislature made an earnest effort to reapportion itself in 1963. Unfortunately, it was then without the benefit of the views of the Supreme Court of the United States expressed in the *Reynolds* cases and without an interpretation by this Court of important and relevant provisions of the Pennsylvania Constitution. Serious disruption of orderly state election processes and basic governmental functions would result from immediate action by any judicial tribunal restraining or interfering with the normal operation of the election machinery at this late date. The Legislature should not be denied a reasonable opportunity to enact new reapportionment legislation. We therefore hold that the 1964 election of Pennsylvania legislators should and must be conducted pursuant to the Acts of January 9, 1964, Nos. 1 and 2.[19] Under no circumstances, however, may the

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[19] These acts represent considerable improvement over previous legislation. The hearing judge, in his findings of fact, said:

> "The last apportionment of the Senate prior to the 1963 Apportionment Act aforesaid was under the Act of May 10, 1921, P. L. 449, as amended by Act of April 26, 1923, P. L. 106 (25 P.S. 2201). Under said 1921-1923 Acts, Philadelphia was divided into

1966 election of members of the Pennsylvania Legislature be conducted pursuant to a constitutionally invalid plan.

> eight senatorial districts, which under 1921 [sic] population statistics ranged in percentage of district population to total Philadelphia population from a low of 7.1% (3rd district) to a high of 15.6% (8th district). This imbalance of district percentages to total Philadelphia figures became successively more marked with each decennial census. Under 1960 census figures, the range is from a low of 2.5% (3rd district) to a high of 26.1% (8th district)."

Under the 1964 Act, this imbalance of district percentages in Philadelphia has been largely corrected. (The ratio per senator is 226,387 – 11,319,366 divided by 50.) For example, the third district with one senator now has a population of 251,415, while the eighth district has a population of 248,372. Several other examples of districts in which imbalances were corrected are: District No. 38, which had a population of 134,345 per senator, now has a population of 233,003 per senator; District No. 40, which had a population of 328,712, now has a population of 241,633 per senator; District No. 42, which had a population of 109,140, now has a population of 226,269 per senator; District No. 43, which had a population of 157,955, now has a population of 237,367 per senator; District No. 44, which had a population of 338,549, now has a population of 233,086; District No. 45 which had a population of 509,886, now has a population of 222,104.

In the House of Representatives, where the ratio per representative is 54,150 (11,319,366 divided among 209 members) or 56,597 (if the population is divided by 200), many population disparities were lessened. Several examples can be cited: District No. 2 in Allegheny County, which had a population of 29,883 per representative, now has a population of 50,690 per representative; District No. 3 in Allegheny County, which had a population of 38,804, now has a population of 49,644 per representative; District No. 15 in Allegheny County, which had a population of 75,506, now has a population of 51,036 per representative; District No. 16 in Allegheny County, which had

The task of reapportionment is not only the responsibility of the Legislature; it is also a function which can be best accomplished by that elected branch of government. The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, and other factors inherent in the legislative process, make it the most appropriate body for the drawing of lines dividing the state into senatorial and representative districts. We expect, therefore, that the General Assembly will enact reapportionment legislation in accordance with constitutional requirements.

VII.

In order to prevent undue confusion on the part of those who are assigned the primary task of reapportionment, we feel compelled to discuss several provisions of the Constitution of Pennsylvania as well as to comment upon certain aspects of the opinion filed by the district court.

Article II, Section 16, of the Pennsylvania Constitution, which relates to senatorial districts, provides:

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a population of 74,465, now has a population of 50,322 per representative; Beaver County District No. 1, which had a population of 76,152, now has a population of 51,261; District No. 2 in Bucks County, which had a population of 139,293, now has a population of 71,662; District No. 26 in Philadelphia County, which had a population of 36,459, now has a population of 60,105; District No. 1 in Chester County, which had a population of 49,034, now has a population of 52,912; while District No. 2 in Chester County, which had a population of 80,787, now has a population of 52,392; and District No. 3 in Delaware County, which had a population of 90,026, now has a population of 58,485.

"The State shall be divided into fifty senatorial districts of compact and contiguous territory as nearly equal in population as may be, and each district shall be entitled to elect one Senator. Each county containing one or more ratios of population shall be entitled to one Senator for each ratio, and to an additional Senator for a surplus population exceeding three-fifths of a ratio, but no county shall form a separate district unless it shall contain four-fifths of a ratio, except where the adjoining counties are each entitled to one or more Senators, when such county may be assigned a Senator on less than four-fifths and exceeding one-half of a ratio; and no county shall be divided unless entitled to two or more Senators. No city or county shall be entitled to separate representation exceeding one-sixth of the whole number of Senators. No ward, borough, or township shall be divided in the formation of a district. The senatorial ratio shall be ascertained by dividing the whole population of the State by the number fifty."

The first sentence of Section 16 embraces fully the population principle expressed by the Supreme Court of the United States in the *Reynolds* cases. The Constitution's intention to make population the starting point and controlling criterion in senatorial districting is manifest and mandatory. It acknowledges what the Supreme Court of the United States has also acknowledged, "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters,"[20] by providing that the senatorial

[20] *Reynolds v. Sims*, U.S. , , 84 S. Ct. 1362, 1390 (1964).

districts "should be as nearly equal in population as may be". But this phrase cannot and must not be construed to permit substantial dilution of the right to vote. It is our view that Section 16, when construed as a whole, demands that Senate apportionment legislation respect county lines and lines of other political subdivisions (such as wards, boroughs, and townships), insofar as possible, without doing violence to the population principle enunciated by the first sentence of Section 16 and also by the Fourteenth Amendment to the Federal Constitution. The Supreme Court of the United States has said:

> "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. . . . Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."
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> *Reynolds v. Sims*, 377 U.S. ___, 84 S. Ct. 1362, 1390 (1964).

We hold, therefore, that Article II, Section 16 of the Pennsylvania Constitution requires that senatorial reapportionment legislation must maintain the integrity of counties and other political subdivisions, insofar as possible, and must provide for compact districts of contiguous

territory, subject always to the overriding objective and mandate that such districts shall be "as nearly equal in population as may be." We must emphasize that, if necessary, any political subdivision or subdivisions may be divided or combined in the formation of districts where the population principle cannot otherwise be satisfied. Furthermore, the number of senators per political subdivision may not be limited if such limitation violates the equal-population principle.

Article II, Section 17, of the Pennsylvania Constitution, which relates to the House of Representatives, provides:

> "The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State as ascertained by the most recent United States census by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio. Every city containing a population equal to a ratio shall elect separately its proportion of the representatives allotted to the county in which it is located. Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives."

It is clear that the first sentence of Section 17 is in accord with the requirements of the federal constitution. It expressly recognizes the equal population principle as the controlling factor in apportioning the House of Representatives. Division of the population of the state by two hundred supplies "a ratio" and a starting point in the construction of districts. In contrast to Section 16 which provides for a fixed number, i.e., "fifty senatorial districts" with each district "entitled to elect one Senator," nothing in Section 17 precludes the establishment of a House of Representatives consisting of more than two hundred members, provided, of course, the equal-population rule is observed.

The requirement that apportionment should be among the several counties further signifies an intention to respect county lines and to utilize counties as units of representation to the maximum extent consistent with the equal-population principle. Indeed, Section 17, when considered as a whole, demands that the boundaries of all political subdivisions be respected when not in conflict with the overriding population principle. It must be interpreted to require that counties with small populations, if necessary, be joined with other counties for the purpose of electing and sharing a representative. We hold that no provision of Section 17 prohibits the division or combination of counties in the formation of districts where the population principle cannot otherwise be satisfied.

VIII.

Although the opinion of the district court ought to anticipate some of the requirements laid down by recent decisions of the Supreme Court of the United States, we feel that it differs in some material respects from the

views contained in those controlling decisions. Throughout the district court's opinion runs the theme that if there is equality of representation as between rural groups of counties on the one hand and urban groups of counties on the other, then Pennsylvania will be apportioned constitutionally.[21] With this theme we cannot agree. Unconstitutional discrimination may exist irrespective of the rural or urban character of the underrepresented or overrepresented district. Those whose task it is to reapportion the Pennsylvania Legislature must approach their assignment with the understanding that they are to create districts which are as nearly equal in population as is practicable.

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."
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> *Reynolds v. Sims*, 377 U.S. , , 84 S.Ct. 1362, 1389-90 (1964).

Furthermore, the district court announced that it would not invalidate unequal representation resulting from use of the county as a district, provided that the disparity from the norm does not exceed one-half of a ratio. In our view, the establishment of a rigid mathematical standard is inappropriate in evaluating the constitutional validity of a state legislative apportionment scheme. In *Roman v. Sincock*, 377 U.S. , n.21, 84

[21] This, of course, is not so, since inequalities may exist between urban or rural districts themselves.

S. Ct. 1462, 1470 n.21 (1964), the Supreme Court pointed out that the lower court in that case had suggested that population-based variance ratios smaller than 1½ to 1 would presumably comport with minimal constitutional requisites, while ratios in excess thereof would necessarily involve deviations from population-based apportionment too extreme to be constitutionally sustainable. The Court said:

> "Our affirmance of the decision below is not meant to indicate approval of the District Court's attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and *it is neither practicable nor desirable to establish rigid mathematical standards* for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, *the proper judicial approach is to ascertain whether*, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, *there has been a faithful adherence to a plan of population-based representation*, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." (Emphasis supplied.)

Finally, the opinion of the district court declared that there is a discrimination in voting power when voters may, by reason of the arrangement of legislative districts, vote for two, or three, or even four representatives, while others are restricted to voting for one only. Language which appears in the opinion of Chief Justice Warren

in *Reynolds*, and other cases, indicates that the presence of some multi-member districts in one legislative house is not per se unconstitutional:

> "One body could be composed of single-member districts while the other could have at least some multimember districts."
>
> *Reynolds v. Sims*, 377 U.S. , , 84 S. Ct. , 1362, 1389 (1964).

> "Single-member districts may be the rule in one State; while another State might desire to achieve some flexibility by creating multimember or floterial districts."
>
> *Id.* at , 84 S. Ct. at 1390.

> "We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective."
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> *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. , n. 21, 84 S. Ct. 1472, 1483 n. 21 (1964).

While we do not believe that the creation of multi-member districts of itself would violate the Federal Constitution simply because the voters in a particular district (where justified by population) would vote for two or more representatives while those in another district would vote for a lesser number, we do believe that a legislative scheme which creates single-member districts and multi-member districts in an arbitrary manner would be objectionable. We would agree with the district court, however, that in the absence of any reasonable justification

(historical or otherwise), such districting might be the result of gerrymandering for partisan advantage and, in that event, would be arbitrary and capricious. In light of the constitutional pitfalls inherent in such a districting scheme, it would be more prudent to approach the matter of apportionment by setting up single-member districts unless valid and compelling reasons exist which require the creation of some multi-member districts.

Our interpretation of the relevant provisions of the Pennsylvania Constitution makes mandatory only such requirements as are in harmony with the Fourteenth Amendment to the Constitution of the United States. We hope the difficult and complex task of the Legislature will be clarified by the guidelines set out in this opinion as well as by the *Reynolds* cases.

We have indicated that it is our expectation that the Legislature will proceed in timely fashion to enact reapportionment laws which conform to constitutional requirements. We must recognize, however, that if the General Assembly fails to act in a timely fashion, we shall be obliged to take necessary affirmative action to insure that the 1966 election of Pennsylvania legislators will be conducted pursuant to a constitutionally valid plan. Proper regard for our responsibility compels us to retain jurisdiction of this matter pending legislative action.[*]

Should the Legislature fail to enact a constitutionally valid plan of reapportionment as soon as practical, but not later than September 1, 1965, we shall take such action

[*] Since a new scheme of legislative districting for the entire state, including Bucks County, must be devised in accordance with the principles we have outlined, it is unnecessary for us to reach the specific issues raised by the intervenors.

as may be appropriate in light of the then existing situation.

Jurisdiction retained in accordance with this opinion.

Mr. Chief Justice Bell joins in the opinion of the Court and also files a concurring opinion.